

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHELE ANN CAGLE, a married woman,)

Plaintiff,)

V.)

ABACUS MORTGAGE, INC.; BANK OF AMERICA, N.A.; THE BANK OF NEW YORK MELLON, f/k/a THE BANK OF NEW YORK, as Trustee for the Structured Asset Mortgage Investments II Trust, Mortgage Pass-Through Certificates, Series 2006-AR8; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and JOHN DOES NOS. 1-25.

Case No. 2:13-cv-02157-RSM

ORDER GRANTING MOTION TO DISMISS

This matter comes before the Court upon Defendants' Motion to Dismiss Plaintiff's Complaint. Dkt. # 6. Defendants move to dismiss Plaintiff's Complaint in its entirety for failure to state a claim on which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). Having reviewed the parties' briefs and supporting declarations as well as the remainder of the record, and for the reasons set forth below, the Court grants Defendants' Motion and dismisses Plaintiff's complaint with prejudice.

Background

ORDER GRANTING MOTION TO DISMISS - 1

1

2 Plaintiff Michele Ann Cagle brings the instant suit against her lender, loan server,
3 investor, and original trust deed beneficiary of record (collectively, “Defendants”) for various
4 state law violations pertaining to her housing loan. On September 7, 2006, Plaintiff borrowed
5 \$296,000 from Abacus Mortgage, Inc. (“Abacus”) as a refinance loan on her home located at
6 4203 192nd Place S.W., Lynwood, Washington 98036 (the “Property”). The loan was secured
7 by a Deed of Trust (“DOT”) and evidenced by a promissory note (the “Note”), which permits
8 transfer from the original Lender to a subsequent Note Holder entitled to receive payments
9 under the Note. Dkt. # 4, Ex. 1, ¶ 1. The DOT identifies Abacus as the Lender, Pacific
10 Northwest Title as the Trustee, and Mortgage Electronic Registration Systems, Inc.
11 (“MERS”) as beneficiary and nominee for Abacus and its successors and assigns. *Id.* at Ex.
12 1, p. 19.

13 The Deed of Trust provides that the Note or a partial interest therein “can be sold one
14 or more times without prior notice to Borrower.” Dkt. # 4, Ex. 1, p. 30, ¶ 20. An Assignment
15 of Deed of Trust (the “Assignment”) was recorded on March 22, 2013, which reflected that
16 MERS had assigned its beneficial interest in the DOT to the Bank of New York Mellon
17 (“BNYM”) as Trustee for The Structured Asset Mortgage Investments II Trust, Mortgage
18 Pass-Through Certificates, Series 2006-AR8 (the “Trust”). Dkt. # 7, Ex. B. The Assignment
19 was signed by Rene Rosales on behalf of MERS and notarized by a notary public in Los
20 Angeles County, California. *Id.* A further assignment was recorded on November 26, 2013,
21 through which Bank of America N.A. assigned its beneficial interest in the DOT to
22 Nationstar Mortgage, LLC. Dkt. # 11, Ex. A, Ex. 1. Although Plaintiff has defaulted on her
23 loan repayment obligations, no foreclosure sale on her Property has been initiated.

24 Plaintiff filed the instant Complaint on October 29, 2013 in Snohomish County
25 Superior Court, and Defendants removed the Complaint to this Court on December 2, 2013.
26 See Dkt. # 1, Ex. B (Compl.). Plaintiff primarily alleges that MERS was an improper

ORDER GRANTING MOTION TO DISMISS - 2

1 beneficiary, that it caused loan documents to be fraudulently “robo-signed,” and that MERS’
 2 attempted assignment of the DOT was ineffective. Compl., ¶¶ 3.5, 3.7. Plaintiff further
 3 alleges that Defendants failed to properly and timely transfer the Note and DOT into the
 4 Trust, and that the Note and DOT have therefore been split and are no longer enforceable. On
 5 the basis of these allegations, Plaintiff brings five causes of action for fraud, breach of
 6 Washington’s Consumer Protection Act, RCW 19.86.090 (“CPA”), negligence, declaratory
 7 judgment, and injunctive relief, all of which Defendants now move to dismiss with prejudice.
 8

9 **Analysis**

10 **Legal Standard**

11 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain
 12 sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its
 13 face.’” *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
 14 Where the plaintiff fails to “nudge[] [her] claims across the line from conceivable to
 15 plausible, [her] complaint must be dismissed.” *Twombly*, 550 U.S. at 570. A claim is facially
 16 plausible if the plaintiff has pled “factual content that allows the court to draw the reasonable
 17 inference that the defendant is liable for the misconduct alleged.” *Id.* “Threadbare recitals of
 18 the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
 19 *Id.* (citing *Twombly*, 550 U.S. at 555). In making this assessment, the Court accepts all facts
 20 alleged in the complaint as true, and makes all inferences in the light most favorable to the
 21 non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir.
 22 2009) (internal citations omitted).

23 “The court should freely give leave [to amend] when justice so requires.” Fed. R. Civ.
 24 P. 15(a)(2). Where claims are dismissed under Rule 12(b)(6), the court “should grant leave to
 25 amend...unless it determines that the pleading could not possibly be cured by the allegation
 26 of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Leave to amend need

1 not be granted, and dismissal may be ordered with prejudice, if amendment would be futile.
 2 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).

3 **Fraud**

4 Plaintiff's First Cause of Action states a claim for fraud based on Defendants' alleged
 5 misrepresentation of MERS as a beneficiary under the DOT. Plaintiff alleges that this
 6 misrepresentation constitutes "constructive fraud" under Washington's Consumer Loan Act,
 7 RCW 31.04.027(1)-(3). Defendants move to dismiss Plaintiff's First Cause of Action as
 8 time-barred and inadequately pled.

9 In order to state a claim for fraud, Plaintiff must establish each of the following
 10 elements: "(1) [a] representation of an existing fact; (2) its materiality; (3) its falsity; (4) the
 11 speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be
 12 acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the
 13 person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his
 14 right to rely upon it, [and] (9) his consequent damage." *Kirkham v. Smith*, 106 Wash. App.
 15 177, 183, 23 P.3d 10 (2001); *see also Stiley v. Block*, 130 Wash.2d 486, 505, 925 P.2d 194
 16 (1996). Common law fraud thereby "requires proof of a knowing and intentional
 17 misrepresentation." *Id.* The plaintiff must plead with particularity "both the elements and the
 18 circumstances of fraudulent conduct." *Haberman v. Washington Pub. Power Supply Sys.*, 109
 19 Wash.2d 107, 165, 744 P.2d 1032 (1987); *see also* Fed. R. Civ. P. 9(b).

20 Defendants contend that Plaintiff's First Cause of Action must be dismissed because
 21 Plaintiff fails to plead particular facts to support each element of her fraud claim. In
 22 particular, Defendants contend that Plaintiff cannot demonstrate that Defendants made any
 23 false statement by identifying MERS in a nominee capacity under the DOT. Further,
 24 Defendants assert that the sole case on which Plaintiff relies, *Bain v. Metro Mortgage Group,*
 25 *Inc.*, 175 Wash.2d 83, 285 P.3d 34 (Wash. 2012), arose after the loan was executed, and the
 26 statement thereby could not have been false when made. Defendants also contend that

1 Plaintiff is unable to demonstrate any actionable injury.

2 Plaintiff relies as the basis for all of her claims on the Washington Supreme Court's
 3 decision in *Bain*, wherein the Court held that only the actual holder of the promissory note
 4 may be a beneficiary with the power to appoint a trustee to carry out a non-judicial
 5 foreclosure. *Bain*, 175 Wash. 2d at 89. As a consequence, the Court determined that "MERS
 6 is an ineligible beneficiary within the terms of the Washington Deed of Trust Act, if it never
 7 held the promissory note or other debt instrument secured by the deed of trust." *Id.* 110. This
 8 conclusion led the *Bain* Court to reach its further holding that, under these conditions, "the
 9 fact that MERS claims to be a beneficiary...presumptively meets the deception element of a
 10 CPA action." *Id.* at 120. At the same time, the Court expressly held that the "mere fact that
 11 MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury." *Id.*

12 Accordingly, Plaintiff cannot show that, even if Defendants misrepresented MERS as
 13 an eligible beneficiary with the authority to appoint a successor trustee, Plaintiff sustained
 14 any actionable injury as a consequence. Rather, her duty to repay the loan remains unchanged
 15 irrespective of MERS' role. Aside from injury accruing from the alleged misrepresentation
 16 itself, the only other damages that Plaintiff claims are those incurred in preparing litigation
 17 and attempting to modify her loan. Even if these damages were actionable, Plaintiff has not
 18 and cannot show that the purported fraudulent Assignment was their proximate cause. *See*
 19 *Wilson v. Bank of America, N.A.*, 2013 WL 275018 (W.D. Wash. 2013) (dismissing fraud
 20 claim with prejudice where plaintiffs did not allege that they would have taken an alternate
 21 course but for a purportedly fraudulent assignment) (citing *Turner v. Enders*, 15 Wash. App.
 22 875, 552 P.2d 694, 697 (Wash. Ct. App. 1976)).

23 Although Plaintiff fails to plead additional requisite elements of her fraud claim, such
 24 as detrimental reliance, the absence of an actionable injury leads the Court to conclude that
 25 the defects in her claim cannot be repaired by amendment. Accordingly, Plaintiff's first
 26

1 Cause of Action for fraud is dismissed with prejudice.¹

2 **Consumer Protection Act**

3 Plaintiff's Second Cause of Action for violations of the CPA largely parallels her
 4 fraud claim. Plaintiff contends that Defendants engaged in unfair business practice by
 5 misrepresenting MERS as a beneficiary in her DOT, improperly assigning its interest in the
 6 DOT after the closing date of the Trust, and using documents signed by a suspected MERS
 7 robo-signer. *See* Compl., ¶¶ 3.9, 5.2, 5.3. Plaintiff further asserts that Defendants' failure to
 8 properly transfer the Note and DOT into the Trust have caused them to become separated,
 9 rendering them unenforceable. Defendants move to dismiss Plaintiff's Second Cause of
 10 Action on the grounds that its allegations regarding MERS fail to support an unfair or
 11 deceptive practice causing actionable injury to Plaintiff. The Court agrees.

12 In order to state a claim for a violation of the CPA, a plaintiff must establish the
 13 following elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or
 14 commerce, (3) that impacts the public interest, (4) injury to the plaintiff's business or
 15 property, and (5) a causal link between the unfair or deceptive act and the injury suffered.
 16 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 785, 719
 17 P.2d 531 (1986). A failure to meet any one of these prongs is fatal to the plaintiff's CPA
 18 claim. *Id.*; *Besel v. Viking Ins. Co.*, 105 Wash.App. 463, 483, 21 P.3d 293 (2001).

19 For the same reasons as her fraud claim, Plaintiff's CPA claim fails with respect to
 20 the alleged misrepresentation of MERS as an eligible beneficiary and its subsequent
 21 assignment of its interests. Plaintiff has not shown that she has incurred any actionable injury
 22 arising from MERS' participation in her Loan. *Bain* makes clear that the mere listing of
 23 MERS as a beneficiary is not an actionable injury under the CPA, and Plaintiff has failed to
 24 allege any prejudice resulting from MERS' role. Courts have been uniform in dismissing

25 _____
 26 ¹ As the Court concludes that Plaintiff's fraud claim is inadequately pled, it does not reach Defendants' further argument that it should be dismissed as time-barred under Washington's three-year statute of limitations for fraud, RCW 4.16.080(4).

1 complaints that rest on bare allegations that MERS' participation tainted subsequent
 2 assignments and foreclosure actions. *See Kullman v. Northwest Trustee Services, Inc.*, 2012
 3 WL 5922166, *2 (W. D. Wash. 2012) ("Plaintiffs have failed to allege any prejudice arising
 4 from MERS' role in the foreclosure."); *Peterson v. CitiBank, N.A.*, 2012 WL 4055809, at *4
 5 (Wash. Ct. App. 2012) (finding that plaintiffs had sustained no actionable injury because,
 6 "regardless of MERS' conduct as the beneficiary under the deed of trust, the Petersons'
 7 property would still have been foreclosed upon based on their failure to make payments on
 8 the loan"); *Myers v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 678148, *3
 9 (W.D. Wash. 2012) (dismissing complaint where plaintiff "fails to allege that MERS took
 10 any action in regards to him"). Plaintiff's purported damages arising from her filing of this
 11 litigation also do not constitute an actionable injury under the CPA. *See, e.g., Sign-O-Lite
 12 Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) ("having
 13 to prosecute" a CPA claim "is insufficient to show injury").

14 Plaintiff's additional allegations fail to establish an unfair or deceptive act or practice.
 15 Plaintiff challenges the securitization of her mortgage loan, alleging that the endorsement of
 16 her Note and Assignment of the DOT occurred after the closing date specified in the Pooling
 17 and Services Agreement ("PSA") that controls the Trust. Compl., ¶ 3.9. However, the Note
 18 and the DOT, both of which were signed by Plaintiff, expressly authorize subsequent
 19 assignments without the borrowers' consent and without waiving her obligation to make
 20 payments. Plaintiff consequently cannot show that her obligation to make payments on her
 21 mortgage has been extinguished by transfer of one of these instruments, even if it did occur
 22 in violation of the PSA, as the PSA contract was entirely separate from that giving rise to
 23 Plaintiff's obligations. Further, Plaintiff lacks standing to bring claims based on the PSA, to
 24 which she was not a party. *See, e.g., Frazer v. Deutsche Bank Nat'l Trust Co.*, 2012 1821386,
 25 *2 (W.D. Wash. 2012) ("Plaintiffs are not parties to the pooling and servicing agreement and
 26 present no authority suggesting standing to challenge it."); *Burke & Thomas, Inc. v. Int'l*

1 *Org. of Masters, Mates & Pilots*, 92 Wash. 2d 762, 767 (1979) (third parties may not sue on
 2 a contract absent intent of the contracting parties to assume any obligation toward them).
 3 Plaintiff's related argument that these purportedly improper transfers split the Note from the
 4 DOT, rendering it unenforceable, similarly fails as a matter of law. Typically, such "show me
 5 the note" arguments are made in anticipation of or following a foreclosure sale. Here,
 6 Plaintiff has not shown that a foreclosure sale is pending or even contemplated, and
 7 regardless, courts have consistently rejected "show me the note" arguments. *See Freeston v.*
 8 *Bishop, White & Marshall*, 2010 WL 1186276 (W.D. Wash. 2010) (citing cases).

9 Finally, as to Plaintiff's unsupported allegations of "robo-signing," the Court finds
 10 persuasive the reasoning of other courts that have faced this issue and determined that a
 11 plaintiff lacks standing to challenge an allegedly fraudulent assignment or appointment of a
 12 successive trustee, irrespective of robo-signing. *See, e.g., Brodie v. Northwest Trustee*
 13 *Services, Inc.*, 2012 WL 6192723, *2-3 (E.D. Wash. 2012) (citing cases). Further, such
 14 alleged misconduct has again caused no injury to Plaintiff or affected her loan repayment
 15 obligations. *Id.* at *3 (dismissing with prejudice claims based on robo-signing as "the alleged
 16 misconduct had no bearing whatsoever upon Plaintiff's obligation to make her mortgage
 17 payments").

18 Accordingly, Plaintiff's CPA claims fail as a matter of law. As the Court finds that its
 19 defects cannot be incurred through amendment, the Court dismisses Plaintiff's Second Cause
 20 of Action with prejudice.

21 **Negligence**

22 In support of Plaintiff's Third Cause of Action for negligence, Plaintiff alleges that
 23 Defendants breached their duties under Washington's Deed of Trust Act through the use of
 24 unfair and deceptive practices, including robo-signing of documents. Plaintiff's negligence
 25 claim is wholly derivative of her CPA and fraud claims and thus fails as a matter of law for the
 26 same reasons detailed above. Accordingly, Plaintiff's Third Cause of Action is also

1 dismissed with prejudice.

2 **Declaratory and Injunctive Relief**

3 Plaintiff's Fourth Cause of Action for Declaratory Judgment seeks the Court's
4 declaration that any assignment by MERS of its beneficial interest is void under Washington
5 law. Plaintiff's Fifth Cause of Action seeks to enjoin Defendants from making any further
6 conveyances of Plaintiff's loan and from attempting any non-judicial foreclosure of the
7 Property. Irrespective of their merits, both claims fail as a matter of law on jurisdictional
8 grounds.

9 Article III of the United States Constitution restricts the jurisdiction of the federal
10 courts to "cases or controversies." If a case is not ripe for adjudication, a federal court lacks
11 jurisdiction to hear it under Article III and must dismiss the case without reaching its merits.
12 See *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1274 (9th Cir. 1981); *Dianes v.*
13 *Alcatel, S.A.*, 105 F.Supp.2d 1153, 1155 (E.D. Wash. 2000). "Unless an actual controversy
14 exists, the District Court is without power to grant declaratory relief." *Garcia v. Brownell*,
15 326 F.2d 356, 357-57 (9th Cir. 1956). Plaintiff's threadbare conjectures that a foreclosure
16 sale may occur in the future suggest only the possibility of contingent events and are
17 accordingly insufficient to satisfy the ripeness doctrine. Here, there is no pending foreclosure
18 sale or assignment, and hence no actual controversy giving rise to this Court's jurisdiction to
19 hear Plaintiff's Fourth Cause of Action. Similarly, as no foreclosure sale has been initiated,
20 Plaintiff's claim for injunctive relief is not ripe for adjudication and must also be dismissed
21 on jurisdictional grounds.

22 **Conclusion**

23 For the reasons set forth herein, the Court hereby ORDERS that Defendants' Motion
24 to Dismiss Plaintiff's Complaint (Dkt. # 6) is GRANTED for failure to state a claim pursuant
25 to Fed. R. Civ. P. 12(b)(6). As the Court finds that its defects cannot be cured by amendment,
26 Plaintiff's Complaint is dismissed in its entirety with prejudice and without leave to amend.

ORDER GRANTING MOTION TO DISMISS - 9

1
2 DATED this 5th day of September 2014.
3
4



5 RICARDO S. MARTINEZ
6 UNITED STATES DISTRICT JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26